

**THE GODLESS GRADUATION
CEREMONY?: THE STATE OF STUDENT-
INITIATED GRADUATION PRAYER AFTER
LEE V. WEISMAN AND *SANTA FE
INDEPENDENT SCHOOL DISTRICT V. DOE***

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INTRODUCTION

For many, there is no better time to pray than at high school graduation. Graduation can be a time to pray in thanks for the completion of twelve seemingly endless years of public school and for the best in a time of new beginnings.

And yet, the Supreme Court, in *Lee v. Weisman*,¹ held that a member of the clergy cannot give even a nonsectarian, non-denominational prayer at a public high school graduation ceremony.² *Lee* involved a short, nonsectarian, nonproselytizing prayer given by a rabbi. The Supreme Court held that this prayer violated the Establishment Clause because the prayer was state-sponsored, because attendance at graduation was, for all purposes, mandatory, and because of the risk of religious coercion of high school students.

In response to complaints from students and the community about “godless” graduation ceremonies, many school districts have turned to “student-initiated” prayer in an attempt to continue a tradition of graduation prayer.³ The Supreme Court has not addressed the constitutionality of these student-led and student-initiated prayers in graduation ceremonies.

1. 505 U.S. 577 (1992).

2. *See id.*

3. In a Phi Delta Kappa survey conducted in the year after *Lee*, seventy-one percent of school superintendents reported that their school districts included some type of prayer at graduation ceremonies. *See* Martha M. McCarthy, *A Wink and a Nod to Student-Initiated Devotionals in Public Schools*, 139 EDUC. LAW REP. *1, *16 n.5 (2000) (citing Larry Barber, *Prayer at Public School Graduation: A Survey*, 75 PHI DELTA KAPPAN 125 (1993)).

The Supreme Court has, however, addressed student-initiated prayers in the context of pre-game ceremonies for football games. In *Santa Fe Independent School District v. Doe*,⁴ the Court recently held that prayers before football games, when initiated by a majority vote of the student body, violate the Establishment Clause. The next horizon on the school prayer landscape will most likely be a re-examination of graduation prayer.

Every year, over half of the nation's public high school graduation ceremonies contain some sort of religious invocation or benediction.⁵ Three quarters of these are student-led prayers.⁶ Student-led prayers are those prayers which are actually given by members of the student body. Student-initiated prayers differ slightly, in that the proposal to have a prayer comes from the students, instead of from a mandate or a vote of the school board. The two are not mutually exclusive and are often used in conjunction with one another. Typically, schools trying to avoid Establishment Clause problems use prayers that are both student-led and student-initiated.

Student-initiated prayers take essentially two forms. The first form is a vote by the graduating class as to whether a prayer will be said at the graduation ceremony. This vote may also include deciding which student will give the prayer, or selecting the speaker from a list of student volunteers. The second form of student-initiated prayer is what this note terms "truly student-initiated": an individual speaker, selected by facially neutral procedures, choosing to give a speech containing religious messages or prayer.⁷

This paper examines student-led and student-initiated prayers at public high school graduation ceremonies to determine if they are consistent with the Supreme Court's Establishment Clause jurisprudence.⁸ It concludes that prayers

4. 120 S.Ct. 2266 (2000).

5. See Jonathan C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 NEB. L. REV. 411, 411 (1995).

6. See *id.*

7. Many schools choose the speaker based on grade point average or class standing, for example. See, e.g., *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 (9th Cir. 1998). Another option might be allowing the senior class president to give a speech.

8. While this paper examines only public high school graduation ceremonies, there are many other instances of graduation prayers being debated at universi-

given in response to a vote by the student body, i.e., the first form of student-initiated prayer, are indistinguishable from the Supreme Court's decisions in *Lee v. Weisman*⁹ and *Santa Fe Independent School District v. Doe*,¹⁰ and, therefore, are unconstitutional. It argues, as to the second form of truly student-initiated prayer, however, that religious speech of an individual speaker chosen on facially neutral grounds and not sponsored by the state in any way does not violate the Establishment Clause. Such speech must be permitted in order to protect the student's right to free exercise of religion.

Part I examines the relevant Supreme Court precedents involving the Establishment Clause in terms of general jurisprudence regarding prayer in schools. Part I also describes two major Supreme Court cases in the area: *Lee v. Weisman*, the "graduation prayer" case, and *Santa Fe Independent School District v. Doe*, a case which concerned student-initiated prayer at public high school football games. Part II reviews two post-*Lee* federal appellate court decisions on what might be termed "truly student-initiated" prayer: *Doe v. Madison School District No. 321*¹¹ and *Adler v. Duval County School Board*.¹² These cases upheld the constitutionality of policies allowing student speakers, chosen on facially neutral grounds, to independently choose to include religious messages as part of their graduation speeches. Part III concludes that the first form of student-initiated graduation prayer is unconstitutional, in accordance with the decisions in *Lee* and *Santa Fe*. However, where prayer is "truly student-initiated" and there is an absence of control by the school district and, by extension, the state, the student's right to free exercise of religion should prevail.

ties and even law schools. See, e.g., Kara Altenbaumer, *Law Students Clash With Faculty Over Graduation Prayer*, THE LUBBOCK AVALANCHE-JOURNAL, (Apr. 22, 2000) <http://lubbockonline.com/stories/042200/loc_0422000084.shtml> (describing decision of law school faculty at Texas Tech University to override the vote of eighty-seven percent of law school students participating to have a prayer at a law school graduation ceremony).

9. 505 U.S. 577 (1992).

10. 120 S.Ct. 2266 (2000).

11. 147 F.3d 832 (9th Cir. 1998).

12. 206 F.3d 1070 (11th Cir. 2000).

I. BACKGROUND

A. *Supreme Court Jurisprudence on Prayer in the Public Schools*

The First Amendment of the U.S. Constitution contains two clauses relating to religion: the Free Exercise Clause and the Establishment Clause.¹³ The Free Exercise Clause guarantees freedom of religious expression to individuals, while the Establishment Clause prohibits government from becoming involved in religious affairs.¹⁴ The Establishment Clause also prevents religious officials from exerting undue influence over the government.¹⁵ In part, the First Amendment protects free speech by maintaining a separation between church and state. As the Supreme Court noted in *Lee*, “[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”¹⁶ There is an inherent conflict between the Establishment Clause and the Free Exercise Clause in that the free exercise of religion may be sacrificed in order to keep the government out of religious matters.

Throughout the history of Establishment Clause jurisprudence, the Supreme Court has struggled to refine the tests used to determine if the Establishment Clause had been violated. For a period of time, the Court referred to the separation between church and state as a wall dividing the two institutions.¹⁷ No state or federal government could pass laws that aided religion or preferred one religion over another.¹⁸ Taxes could not support religious activities or institutions, nor could people be punished for expressing religious beliefs.¹⁹ In one

13. See U.S. CONST. amend I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”)

14. See Lisa Langendorfer, Comment, *Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence*, 33 U. RICH. L. REV. 705, 705 (1999).

15. See *id.*

16. *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

17. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (holding that in a prosecution for bigamy, a challenge of jurors on the ground that they were living in polygamy was valid).

18. See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (holding that the state could constitutionally provide transportation for school-age children to both public and parochial schools).

19. See *id.* at 15-16.

early case, Justice Black said that the wall of separation erected by the First Amendment "must be kept high and impregnable."²⁰

More recently, however, some courts have noted that the wall of separation has become "more metaphor than mortar."²¹ What was once a solid line is now a blurred distinction. The Supreme Court cases regarding religion, particularly religion in public schools, are nothing if not confusing: in eight Supreme Court cases determining issues of religion, there were thirty-one separate opinions written.²²

In *Lemon v. Kurtzman*²³ the Supreme Court articulated a test for determining if a statute was in violation of the religion clauses of the First Amendment. The *Lemon* test states that to be constitutional, a statute must have secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion.²⁴ However, it is questionable whether the *Lemon* test is still good law. Several times, the Court has declined to apply it.²⁵ Justice Scalia has said outright that he will not apply the *Lemon* test, and has pointed out that five justices have personally criticized *Lemon* and that another justice joined an opinion doing so.²⁶

However, despite doubt about the validity of the *Lemon* test, the Supreme Court seems reluctant to completely abandon it. While the Court declined to apply it in *Lee*,²⁷ it also refused

20. *Id.* at 18.

21. *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1481 (3d Cir. 1996) (holding that graduation prayers initiated by a vote of the students violated the Establishment Clause). *See also* *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (holding that a Christmas display with a nativity scene, Christmas tree, and a Santa Claus house was not a violation of the Establishment Clause).

22. *See* J. Alexander Tanford, *The Death of Graduation Prayer: The Parrot Sketch Redux*, 24 J. LAW & EDUC. 423, 435 (1995).

23. 403 U.S. 602 (1971) (holding unconstitutional statutes allowing the benefit of state aid to nonpublic schools as an excessive entanglement of church and state).

24. *See id.* at 612-13.

25. *See* *Lee v. Weisman*, 505 U.S. 577, 587 (1992). *See also* *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that clergy could be employed as official legislative chaplains and open the Nebraska state legislative sessions with prayer); *Lynch*, 465 U.S. at 679.

26. *See* *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (holding that a school district must allow religious groups equal access to school facilities as other civic groups).

27. *See* 505 U.S. at 587.

to overrule the test. Further, in *Santa Fe*, the Court did analyze the policy in question with respect to the factors articulated in *Lemon*.²⁸ It is clear that *Lemon* cannot yet be discarded as a valid test for Establishment Clause cases.

B. The Graduation Prayer Case: Lee v. Weisman

In *Lee*, the Supreme Court faced the question of whether a prayer given by a clerical member as a part of an official school graduation ceremony violated the religion clauses of the First Amendment.²⁹ The prayer was actually given at a middle school graduation ceremony, although the Court held that the point was not moot because the objecting student was also likely to face a similar invocation and benediction at her high school graduation ceremony.³⁰ A rabbi was invited by the principal to deliver prayers at the graduation exercises and was given a pamphlet entitled "Guidelines for Civic Occasions."³¹ The rabbi was also advised that the prayer should be nonsectarian.³² The two prayers given were estimated by the Court to have lasted no longer than a minute each, including a respectful moment of silence both before and after each prayer.³³

The Supreme Court held that even this short, nonsectarian, nonproselytizing prayer was a violation of the Establishment Clause because it coerced students to participate in a state-sponsored religious exercise.³⁴ The majority asserted:

[t]he sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here,

28. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S.Ct. 2266, 2282 (2000).

29. See 505 U.S. at 580. These are provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts. See *id.*

30. See *id.* at 584. The hate mail and death threats received by the family who filed suit on behalf of their daughter as the courts considered the case illustrates the contentious nature of the issue. See Jason J. Bach, *Students Without Rights: The Elimination of Constitutional and Civil Rights, as They Apply to Minors*, Nev. Law., Jan. 2000 at *19, *22.

31. See 505 U.S. at 581.

32. See *id.*

33. See *id.* at 583.

34. See *id.* at 598.

and it is forbidden by the Establishment Clause of the First Amendment.³⁵

The *Lee* court said that the “dominant facts” that “mark[ed] and controll[ed]” this decision were that the state officials controlled the prayers given at the graduation ceremony and that the attendance of students who objected to the prayer was essentially mandatory.³⁶

The first factor in the Court’s decision was a determination that the prayer was state-sponsored. The Court found the principal’s determination that a prayer would occur to be the equivalent of a state mandate that a religious exercise be held at the graduation ceremony.³⁷ The principal also decided who would give the prayer. In addition, the Court said that the principal of the school controlled and directed the content of the prayers by furnishing the rabbi with guidelines.³⁸ The Court stated that “it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government, and that is what the officials attempted to do.”³⁹

Another factor in the Court’s decision was the mandatory nature of attendance at the graduation ceremony. Although attendance was not required and students could receive their diplomas without attending the ceremony, the Court explained that graduation is one of life’s most important events.⁴⁰ Missing it would mean the “forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.”⁴¹ The Court rejected the School Board’s argument that graduation is a voluntary exercise that a student could miss if she disagreed with the invocation and benediction: “The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.”⁴²

35. *Id.* at 599.

36. *See id.* at 586.

37. *See id.* at 587.

38. *See id.* at 588.

39. *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (holding that state officials could not compose and require the recitation of a prayer in public schools)) (citations omitted).

40. *See id.* at 595.

41. *Id.*

42. *Id.* at 596.

Finally, the Court considered the coercion present in public schools. The Court has consistently held that primary and secondary school children are at particular risk of subtle, indirect coercion.⁴³ However, the Court noted that it did not reach the issue of a similar circumstance involving mature adults,⁴⁴ suggesting that the public school setting is unique.⁴⁵ Essentially, the Court held that secondary school age children should not be put in the position of choosing between either missing graduation or submitting to a state-sponsored religious exercise.⁴⁶

C. *The Plot Thickens: Santa Fe Independent School District v. Doe*

The most recent Supreme Court decision regarding the separation between church and state as it applies to school prayer is *Santa Fe Independent School District v. Doe*.⁴⁷ *Santa Fe* involved prayer, not at high school graduation ceremonies, but at high school football games. The school board in the southern Texas district, in order to continue the ritual of prayer before football games, implemented a policy which allowed the students to vote in two elections: one to determine whether "a brief invocation and/or message" should be delivered during the pre-game ceremonies of the home varsity football games, and another to choose a student, from a list of vol-

43. See, e.g., *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring) (holding laws requiring students to begin each day with readings of Bible passages unconstitutional under the Establishment Clause).

44. See *Lee*, 505 U.S. at 593.

45. Indeed, the Court has upheld the constitutionality of prayer in other venues. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the constitutionality of opening the Nebraska state legislative sessions with prayer).

46. See 505 U.S. at 593.

47. 120 S. Ct. 2266 (2000). It is interesting to note that, although the Supreme Court decided fewer total cases in the 1999–2000 term than it had in many years (seventy-three decisions), it chose to address three Establishment Clause cases: *Santa Fe*, 120 S. Ct. 2266 (2000); *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) (holding that taxpayer money could be used to buy computers and other instructional materials for religious schools); and *Board of Regents of the University of Wisconsin System v. Southworth*, 120 S. Ct. 1346 (2000) (upholding the constitutionality of a public university charging students an activity fee used to fund extracurricular student speech, provided that allocation of the funding support was viewpoint neutral).

unteers, to deliver the invocation or message throughout the year.⁴⁸

The Fifth Circuit upheld the District Court's holding that the pre-game prayer violated the Establishment Clause.⁴⁹ However, the Fifth Circuit distinguished prayer at football games from prayer at graduation ceremonies, noting that graduation is the sober type of event that is properly solemnized by prayer, in part because it happens only once a year.⁵⁰

The Supreme Court upheld the appellate court, rejecting the school district's argument that its policy for student-initiated prayer represented private speech, not government speech, endorsing religion.⁵¹ The Court noted that the invocations were "authorized by a government policy and [took] place on government property at government-sponsored school-

48. *Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2273 n.6. The school district actually changed the policy after litigation was started. The August policy, as it was known, titled "Prayer at Football Games," was similar to a July policy for graduations. *See id.* at 2273. The August policy allowed for the two elections. Both the July and the August policies had two provisions: the first said that invocations did not have to be "nonsectarian and nonproselytising," and the second was a fallback provision of "nonsectarian and nonproselytising" prayers, in case the first provision failed. *Id.* The August policy was in place when the litigation was started, but the final policy, held facially invalid in this case, was an October policy that was essentially the same as the August policy, while omitting the word "prayer" from the title. *See id.* No new election was held under the October policy to supersede the August policy. *See id.* at 2273 n.5.

49. *See Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2274.

50. *See id.* There has been defiance of the appellate court's ruling outlawing the prayer before football games. In Stephenville, Texas, fifteen students smuggled a portable address system into the high school stadium and led a prayer before a game. In Andrews, Texas, student-led prayers continued even after the Fifth Circuit ruling. The school board president of the Santa Fe school district said he had heard of dozens of school districts across Texas that still planned to allow pre-game prayer. *See Texas Football-Prayer Supporters Defy Court Ban*, THE FREEDOM FORUM ONLINE (Aug. 30, 1999) <<http://www.freedomforum.org/religion/1999/8/30txprayer.asp>>. *See also* Candi Cushman, *Prayer Before Playing*, WORLD ON THE WEB (Nov. 13, 1999) <http://www.worldmag.com/world/issue/11-13-99/national_1.asp>.

51. *See Santa Fe Indep. Sch. Dist.*, 120 S.Ct. 2266. Then-Governor George W. Bush filed an amicus brief with the Supreme Court, asking the court to allow students to pray at football games. *See* Richard Carelli, *Court Rules Against Stadium Prayer*, ASS'D PRESS, June 19, 2000. At the time the case was heard in March, 2000, an ABC News poll said that two-thirds of Americans thought that student-led prayer should be permitted in similar circumstances. *See id.* In March, 2000, ninety-four percent of voters in the Republican Primary in Texas approved a nonbinding resolution supporting student-initiated prayer at sporting events. *See id.*

related events.”⁵² Although the Court specifically noted that not every message given under the same circumstances would be considered government speech, a pre-game prayer could not be considered a public forum, particularly when only one student was allowed to speak throughout the year.⁵³

A key factor for the Court seemed to be the majoritarian process utilized to allow prayer and the effect this had on minority beliefs. The student election, said the Court, “effectively silenced” the views of the minority, put the minority at the mercy of the majority, and did not protect diverse student speech.⁵⁴ In fact, far from making the prayer permissible, the election served to intensify the offense of the minority.⁵⁵

The Court found the majoritarian process especially troublesome because it was coupled with one of the factors from *Lee*: state direction of a religious message. The pre-game prayer clearly bore the imprint of the State, according to the Court. The elections occurred because the school board allowed them. The school board even directed that the student council would hold the elections with the advice and supervision of the principal.⁵⁶ Further, the policy itself invited and encouraged religious messages. Invocations were the only type of message mentioned directly and the purposes of the policy made it clear that a solemn, nonreligious message would be out of place.⁵⁷ In addition, according to the policy, the message or invocation had to be consistent with the goals and purposes of the policy, implying that a religious message was necessary.⁵⁸ Most impor-

52. *Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2275. A poll conducted by the Denver Post newspaper at the same time found that nearly four in ten Colorado public high schools engaged in practices where coaches participated in prayer with their athletes. In addition, a 9News/Denver Post poll conducted by SurveyUSA found that fifty-one percent of those questioned across the state supported the practice. See Adam Thompson, *Prayer and Preps: The Supreme Court Handed Down a Decision Monday that Could Stop Organized Prayer by Athletics Teams*, DENVER POST, June 20, 2000, at D1.

53. See *Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2275.

54. See *id.* at 2276.

55. See *id.* at 2277.

56. See *id.*

57. See *id.*

58. See *id.* The policy's stated purposes were to protect student speech, to “solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition.” *Id.* at 2278–79 (alterations in original).

tantly, however, students understood that the policy was about prayer.⁵⁹

The Court found the imprint of the State to be present in other ways as well: the name of the school was displayed prominently on the jerseys of the football team, on the band and cheerleaders' uniforms, and on the field. The prayer was "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property."⁶⁰ The imprint of the State, combined with the election used to initiate prayer, led to the audience's impression that the prayer was an expression of the views of the majority, delivered under the sanction of the school board.⁶¹

The Court also found coercion, the second factor from *Lee*, to be present in *Santa Fe*, despite the fact that the prayers were held at an extracurricular event. To call football games voluntary was to be "formalistic in the extreme," the Court said.⁶² Some students, namely, the football players, the band, and the cheerleaders, were essentially required to attend. Football games and other extracurricular activities are also part of the complete educational experience.⁶³ In addition, the Court noted that the games are large gatherings of students and faculty, both past and present, as well as family and friends, all rooting for a common cause.⁶⁴ The Court explained that the Constitution forbids the school from forcing students to either choose to attend a social event or not attend to avoid a religious message. Even if the choice was truly voluntary, the Court found that the policy was improper because it coerced students to participate in an act of religious worship.⁶⁵

The Court's opinion recognized the importance of public worship in many communities and the desire to use public prayer to mark certain occasions. The Court reaffirmed that not all religious activity in public schools is unconstitutional—voluntary prayer is within the bounds of the First Amendment.⁶⁶ However, religious activity in public schools must always be in accord with the First Amendment.⁶⁷ The

59. *See id.*

60. *Id.* at 2278.

61. *See id.*

62. *Id.* at 2280.

63. *See id.*

64. *See id.*

65. *See id.* at 2280–81.

66. *See id.* at 2281.

accord with the First Amendment.⁶⁷ The Court also noted the distinction between the public and private sphere, emphasizing that the responsibility and choice of religious beliefs are committed to the private sphere. By passing the policy, the district forced the debate into the public sphere.⁶⁸ This encouraged divisiveness along religious lines in a public school setting, which the Court said was not allowed under the First Amendment.⁶⁹

The Court sent a strong message with *Santa Fe*, calling the case “the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause.”⁷⁰ The Court characterized the school district’s position as asking the Court

to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to “solemnize” a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.⁷¹

Clearly, the Court meant to send a message that policies which may appear neutral, but are actually intended to perpetuate a tradition of prayer at public school events, will not be tolerated.⁷²

II. THE TANGLED WEB POST-*LEE* AND *SANTA FE*: *MADISON AND ADLER*

Based on the precedents of *Lee* and *Santa Fe*, it seems clear that graduation prayer is in danger, even if that prayer is initiated by a vote of the students. A prayer initiated in this

67. *See id.* at 2278.

68. *See id.* at 2279–80.

69. *See id.* at 2280.

70. *Id.* at 2282.

71. *Id.*

72. The Court’s decision has been met with some hostility among those who support prayers at school-sponsored events. *See* Nick Gholson, *Prayer Before a Game Isn’t Offensive*, WASH. TIMES, Sept. 15, 1999, at B1.

fashion would combine the coercion factors the Court deemed present in *Lee* with the majoritarian process that the Court rejected in *Santa Fe*. This conclusion is in line with the majority of appellate courts considering the issue.⁷³ The main question now seems to be whether graduation prayer, particularly prayer that continues a tradition of religious messages at school-sponsored ceremonies, can ever comport with the Establishment Clause.

Several appellate courts have addressed the issue of student-initiated prayer.⁷⁴ The Ninth and the Eleventh Circuits have specifically addressed the issue of whether “truly” student-initiated religious speech at a high school graduation ceremony, by a student who is chosen on facially neutral grounds, can comply with the First Amendment.

A. Doe v. Madison School District No. 321

The Ninth Circuit Court of Appeals upheld “truly student-initiated” prayers at graduation in *Doe v. Madison School Dis-*

73. See generally *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 477 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995) (holding that invocation given at graduation ceremony upon a vote of the seniors violated the Establishment Clause); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (holding that policy allowing for a vote of the graduating students to determine whether a prayer would be held at graduation violated the Establishment Clause). Indeed, only the Fifth Circuit has held otherwise, in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992) (*Jones II*). The prayers in *Jones* were given by student volunteers after a vote of the seniors, determining both the student to give the prayer and the content of that prayer. See *id.* at 965–66. The court first considered the case before *Lee* and concluded that student-initiated prayers were constitutional. See *Jones v. Clear Creek Indep. Sch.*, 930 F.2d 416, 424 (5th Cir. 1991). The court was then ordered to reconsider the case, in light of *Lee*. See *id.* Upon reconsideration, the Fifth Circuit upheld its conclusion that student-initiated prayers did not violate the Establishment Clause. See *Jones II*, 977 F.2d at 972.

74. An interesting incident occurred in Maryland, where Calvert County school officials were persuaded to replace a prayer with a moment of silence, in response to input from the ACLU, the state attorney general's office, and a graduating student, Nick Becker. During the moment of silence, a man in the audience started reciting the Lord's Prayer aloud and many of the people in the 4000 member audience joined him. Becker left the ceremony in protest and was barred from reentering after the prayer ended. He also was barred by school officials from attending a school-sponsored cruise around the Baltimore Harbor on the night of the ceremony. See *Maryland Teen Walks Out of Graduation Over Prayer*, THE FREEDOM FORUM ONLINE (May 28, 1999) <<http://www.freedomforum.org/religion/1999/5/28mdgradprayer.asp>>.

trict No. 321.⁷⁵ In the Madison School District, a minimum of four students, chosen by academic class rank, were invited to speak at the graduation ceremony.⁷⁶ The invited students chose the type and content of the address, including a prayer.⁷⁷ The school administration was forbidden from censoring the speech and from requiring any particular content in the speech.⁷⁸ A facial challenge to the policy was brought under the Establishment Clause on the theory that by allowing students to give prayers or religious songs at the graduation ceremonies, the school was officially sanctioning and perpetuating religious graduation ceremonies.⁷⁹ The district court granted summary judgment for the school district.

The Ninth Circuit examined the case under the precedent of *Lee*. The court pointed out that *Lee* did not *per se* ban all religious activity in public high school commencement ceremonies, but focused on the "dominant facts" of coercion and the obligatory nature of the graduation ceremony.⁸⁰ The court noted that while there were still pressures on students to attend graduation and to conform with their peers, the school was not exerting significant control on the religious content of the graduation program.⁸¹

The court also pointed out the significance of three factors that indicate a lack of school control over the presentations: (1) the presentations were student-led, (2) speakers were chosen on neutral criteria (i.e., academic performance), and (3) individual students controlled the content of their speeches.⁸² Because control over the ceremony was in the hands of the stu-

75. 147 F.3d 832 (9th Cir. 1998) (vacated for mootness because the student plaintiffs had graduated, 177 F.3d 789 (1999)). Although this case has been vacated, the reasoning of the court is still important because the Ninth Circuit is an influential circuit. In addition, the case is important for its possible effects on school districts nationwide as they draft future policies on prayer at graduation ceremonies.

76. See *Madison*, 147 F.3d at 834.

77. See *id.* The exact language of the policy read that a student-speaker could have chosen to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." *Id.* at 833. This differs from the policy at issue in *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000), where an invocation was the only type of message listed.

78. See *Madison*, 147 F.3d at 834.

79. See *id.*

80. See *id.*

81. See *id.* at 835.

82. See *id.*

dents, instead of the state, the school was not “direct[ing] the performance” of a prayer.⁸³

The *Madison* court also noted that not every case in which the state acquiesces in religious activities leads to a violation of the Establishment Clause.⁸⁴ The Supreme Court and the First Amendment require only that the government remain neutral toward religion.⁸⁵ The policy of the Madison School District was neutral on its face with control over content vested in the students, not the school district.⁸⁶ As such, the policy did not violate the Establishment Clause.⁸⁷

B. *Adler v. Duval County School Board*

In *Adler v. Duval County School Board*,⁸⁸ the Eleventh Circuit, in an *en banc* opinion, found no violation of the Establishment Clause where the senior class was allowed to vote on whether to allow two-minute opening and closing messages at graduation ceremonies.⁸⁹ Following the Supreme Court deci-

83. *Id.* (alteration in original).

84. *See id.* at 836. The court cited two Supreme Court decisions containing dicta that supported this proposition: *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (holding that denial of public university funds to a Christian newspaper was viewpoint discrimination and therefore unconstitutional), and *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding that aid provisions to parents of students attending nonpublic schools advanced religion in violation of the Establishment Clause). *See Madison* at 836.

85. *See id.*

86. *See id.*

87. *See id.* at 834.

88. 206 F.3d 1070 (11th Cir. 2000). *Adler* has an extensive case history. The case was first brought by students, but was dismissed by the Eleventh Circuit as moot because the students had graduated. *See Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1477–78 (11th Cir. 1997). The case was brought again in 1998 with the same allegations. The District Court entered final judgment in favor of the School Board. A panel of the Eleventh Circuit then heard the case. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1241 (11th Cir. 1999). The panel held that the graduation prayers were a violation of the Establishment Clause because the imprint of the State, while less obvious than in *Lee*, was present and because the prayers coerced participation. *See id.* at 1248. This judgment was vacated when a petition for rehearing en banc was granted. A petition for certiorari to the United States Supreme Court was filed. *See Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 3741 (U.S. May 22, 2000) (No. 99-1870).

89. *See Adler*, 206 F.3d at 1074. The Eleventh Circuit ruled again on prayer in public high schools two months later in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *judgment dismissed sub nom. Chandler v. Siegelman*, 120 S.Ct. 2714

sion in *Lee*, the Duval County Public School Superintendent instructed all school officials that prayers could no longer be said at graduation ceremonies.⁹⁰ Soon thereafter, based on input from the students and the community as to ways to continue graduation prayer and on the ruling of the Fifth Circuit in *Jones II*,⁹¹ high school principals in Duval County began delegating the decision to the senior class.⁹² The class voted to determine whether student messages would be allowed at the beginning and closing of the graduation ceremony and selected a student to deliver the message from a list of volunteers.⁹³ The student-speakers were to have complete control over the content of their messages, without oversight or contributions from the school or the graduating class.⁹⁴ In 1993, ten of seventeen speakers at Duval County high schools chose to give messages that constituted a form of religious prayer.⁹⁵ The other seven ceremonies either did not have a message or the message was not religious in nature.⁹⁶

On review, the Eleventh Circuit held that the policy of allowing unrestricted messages, if the graduating class voted to do so, was facially valid.⁹⁷ Under the factors enunciated in *Lee*, the Court found that the policy was constitutional.⁹⁸ The court said that the messages were not directed by the school because the school did not mandate that a message should occur, but

(2000). In that case, the court did not directly address the issue of graduation prayer, but held that the district court could not enjoin an Alabama state law that allowed nonsectarian, nonproselytizing student-initiated prayer, benedictions, and invocations at graduation ceremonies and other school-related events. *See id.* at 1258. The court held that while schools cannot censor religious speech, "even genuinely student-initiated religious speech may constitute state action if the State *participates in or supervises* the speech." *Id.* at 1264. The court's holding indicates that if the state neither supervises nor oversees the speech and the speech is truly student-initiated, then it can be subjected only to the same reasonable time and place restrictions as non-religious student speech. *See id.* at 1264-65.

90. *See Adler*, 206 F.3d at 1071.

91. 977 F.2d 963 (5th Cir. 1992).

92. *See Adler*, 206 F.3d at 1072. A memo to the principals in the district from the district's legal affairs officer noted that lawsuits were threatened from both sides, those wanting prayer and those not wanting prayer, depending on what action the district chose to take. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* at 1090-91.

98. *See id.* at 1084.

left this to the graduating class to decide.⁹⁹ Further, even if the graduating class voted to have a message, there was no guarantee that this message would be a prayer.¹⁰⁰ The school board and its agents did not control the drafting or the content of the message.¹⁰¹ The senior class, once it had decided that a message should be delivered, also had no control over the ultimate message.¹⁰²

The court also held that coercion, the second factor in *Lee*, was not present. Since the school board and the graduating class could not control whether a prayer took place, they could not “require’ or ‘coerce’ the student audience to participate in any privately-crafted message.”¹⁰³ The court was also unwilling to assume that the seniors would interpret the school’s refusal to censor the religious content of a private speaker as an endorsement of that message.¹⁰⁴

The *Adler* court emphasized that only government neutrality toward religion is mandated under the Establishment Clause.¹⁰⁵ The state cannot suppress private religious speech, nor can it act in a hostile manner toward such speech.¹⁰⁶ The court also rejected the idea that the religious content of any speech was attributable to the school because of the school’s sponsorship of or control over the event.¹⁰⁷

III. THE STATUS OF THE TRULY STUDENT-INITIATED GRADUATION PRAYER AFTER *LEE* AND *SANTA FE*

Graduation prayer is a difficult issue, particularly when a speaker is chosen on facially neutral grounds and chooses on

99. *See id.* at 1082.

100. *See id.*

101. *See id.* at 1076.

102. *See id.*

103. *Id.* at 1083.

104. *See id.*

105. *See id.* at 1078.

106. *See id.*

107. *See id.* at 1080. It is interesting to note that the *Adler* court pointed out that the memorandum from the school district’s legal affairs expert addressing the constitutionality of student-led, student-initiated prayer did not indicate that the secular purposes of the policy were a “sham.” *See id.* at 1086. By contrast, “sham” is precisely the word the Court used to describe the secular basis of the policy in *Santa Fe*. The memo at issue in *Adler*, the court said, advocated neither for or against the prayers, but, at most, implied that student prayers could be offered even after *Lee*. *See id.*

his or her own to give a religious speech. Justice Souter's concurrence in *Lee*¹⁰⁸ noted that had the State chosen its graduation day speakers based on neutral criteria and had a speaker independently chosen to deliver a religious message, the Court would have had a harder time holding that the State endorsed the religious exercise.¹⁰⁹ In this situation, the balancing between the Establishment Clause and free speech becomes even more difficult. Nevertheless, this section argues that the free speech rights of student-speakers should prevail.

A. *State-Sponsorship*

The first controlling factor in *Lee* is state-sponsorship.¹¹⁰ Graduation is nearly always a school-sponsored event. The ceremony has the primary purposes of marking the end of secondary school and of distributing diplomas.¹¹¹ As the Third Circuit noted in *Black Horse Pike*, the ceremony is a school-sponsored event where school officials decide the sequence of events and speakers.¹¹² It is normally held on school property, at no cost to students because the school board pays for necessary costs.¹¹³ The *Lee* court also remarked that "[a]t a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students."¹¹⁴

In addition, as the Court noted in *Santa Fe*, the speech is given to "a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property."¹¹⁵ Often, the ceremonies are held on the school football field, in the school gym, or in the school auditorium. These places often have the name of the school prominently displayed. The graduation gowns typically are in school colors. Thus, the imprint of the school would be clear.

108. See *Lee v. Weisman*, 505 U.S. 577, 609 (1992).

109. See *id.* at 630 n.8 (Souter, J., concurring).

110. See *id.* at 586.

111. See *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 453 (9th Cir. 1994).

112. See *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1479 (3d Cir. 1996); see also *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1244 (11th Cir. 1999).

113. See *Black Horse Pike*, 84 F.3d at 1479; see also *Harris*, 41 F.3d at 453.

114. 505 U.S. at 597.

115. 120 S.Ct. 2266, 2278 (2000).

However, as the *Adler* court pointed out, even if the school controls the ceremony, it would not control the “elements which are most crucial in the Establishment Clause calculus: the selection of the messenger, [and] the content of the message. . . .”¹¹⁶ This is a key difference. It is harder to say that the school directed performance of a religious exercise when the school did not know whether a religious exercise would even take place.

One factor that schools should take into account when designing a policy that would avoid state-sponsorship and allow for truly student-initiated prayer is the wording of the policy. In *Santa Fe*, the Court noted that the wording of the policy made it difficult to see that a message other than a prayer could be given, because an invocation was the only type of message listed.¹¹⁷ In *Madison*, on the other hand, a prayer was only one of many types of messages a student could choose to give, and the list was not exclusive.¹¹⁸ When a policy is broadly worded so as to allow many types of messages, prayer included, it is much harder to find state-sponsorship of a religious message.

B. *Obligatory Nature of the Ceremony*

The second controlling factor in *Lee* was the obligatory nature of the graduation ceremony.¹¹⁹ The Court found that while, technically, a student was free to skip the graduation ceremony, this forced students who wished to avoid prayer into the difficult choice of missing one of the most important events in their life or being subjected to an unwanted, state-sponsored prayer.¹²⁰ The fact that graduation ceremonies are not truly mandatory must be taken as a constant in any analysis of graduation prayer.¹²¹

116. *Adler*, 206 F.3d at 1080.

117. *See Santa Fe Indep. Sch. Dist.*, 120 S.Ct. at 2277.

118. *See Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 (9th Cir. 1998).

119. *See Lee*, 505 U.S. at 586.

120. *See id.* at 595–96.

121. *See Doe*, 147 F.3d at 835.

C. Coercion

It is hard to determine how the coercion factor might be balanced in the case of a truly student-initiated prayer. On one hand, coercion in the form of peer pressure, as the Court noted in *Lee*, is present in every high school.¹²² Public schools are areas of high sensitivity and the Court has consistently noted that school-age children are particularly susceptible to coercion.¹²³ A student giving a prayer, particularly if that student is popular or well-regarded, might be more persuasive than an adult or a clergy member.

The *Adler* court said that because the school and the graduating class did not mandate that a religious message be delivered, the school could not have coerced students into participating.¹²⁴ This was an overly simplistic analysis, which ignored the realities of the situation. Surely state-sponsorship has an impact on the coercive effect, but the message itself must also have some coercive effect, in and of itself.

The Court in *Lee* also noted that the only way for students not to participate in the prayer was to remain quiet and be respectful—the exact same action the participating students took.¹²⁵ The fact that there was no way for students to object to the prayer in a meaningful way was an issue for the Court and should remain an issue in truly student-initiated prayer as well.

On the other hand, the coercive effect of any prayer must be analyzed closely with a factor from *Santa Fe*—the vote of a majority. Without knowledge that the prayer is in some way sponsored or approved by either the school or the majority of students, the coercive effect is reduced. When a message is truly one student voicing his or her beliefs, the coercive effect is far less than when the message is, in essence, the voice of the majority or of the State.

122. See *Lee*, 505 U.S. at 593.

123. See *id.*

124. See *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1082 (11th Cir. 2000).

125. See *Lee*, 505 U.S. at 593.

D. The Voice of the Majority

A main problem for the Court in *Santa Fe* was the majoritarian process used to initiate the speech.¹²⁶ The vote, the Court said, which took place only because the school board allowed it, “does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority.”¹²⁷ As the Court explained in *Board of Regents of University of Wisconsin System v. Southworth*,¹²⁸ student elections that determine issues by majority rule are constitutionally problematic because they undermine “viewpoint neutrality.”¹²⁹ “Viewpoint neutrality” treats minority views with the same respect as majority views.¹³⁰ Constitutional rights, such as access to a public forum, cannot “depend upon majoritarian consent.”¹³¹ This principle controlled in *Santa Fe*.

However, there is no such vote in the case of a speaker selected on facially neutral grounds. Even if the student is somehow selected by a vote (as was the case in *Adler*), the content of the speech, if it is to be constitutionally protected, must be the student’s own. Indeed, graduates often have a great deal of latitude with the content of their speeches. Certainly the school has some control, in that racist remarks, profanity, or obscenity obviously are not allowed, but speakers have a great deal of control as well. Thus, arguably, this kind of vote or election process would not affect the ultimate content of the speech.

Some policies, however, might make this claim more difficult to maintain. For example, the policy at issue in *Adler* allowed the students to choose the speaker, which would increase the chances that a member of the majority would be chosen.¹³² This method of selection also would leave the door open to problems in application because speakers could be chosen based on the likelihood that they would give a religious message.

126. See *Santa Fe Indep. Sch. Dist.*, 120 S.Ct. at 2276.

127. *Id.*

128. 120 S.Ct. 1346 (2000).

129. See *id.* at 1354.

130. See *id.* at 1357.

131. *Id.*

132. See *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1072 (11th Cir. 2000).

With other selection methods, the policy may not always reflect majority views. In the case of a valedictorian speech, for example, it is entirely probable that the valedictorian may not be part of the majority. A speech might include references to Allah, Buddah, or perhaps no religious references at all. In other words, the speeches would not always be a representation of the voice of the majority. This arguably means that, particularly with policies, which select students based on class rank, the majority does not control the content of the prayer.

It would be relatively easy to make it clear that the speech was neither the result of a majority vote, nor a representation of the views of the school board, faculty, or students. Certainly, disclaimers were not enough to save the policies in other school prayer cases.¹³³ However, the combination of disclaimers and the lack of majority vote initiating the prayer could help express to the audience that any religious message is the result of one student's right to free speech and not the mandate of the state.

E. Free Speech

The schools are not required to censor all religious speech. In fact, doing so is a violation of the Free Exercise Clause.¹³⁴ Schools merely have to remain neutral in the face of religion.¹³⁵ For example, religious student groups must be given the same rights of access to school property for their meetings as any other school group.¹³⁶ However, remaining neutral is not the equivalent of being passive in the face of religious speech. Schools sometimes have the responsibility to actively participate in guaranteeing a lack of religious coercion at school-sponsored events. In fact, the *Chandler* court said that to accommodate religious speech without promoting it, the speech must simply be "permitted." Not required. Not commanded.

133. See *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 455 (9th Cir. 1994); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1482 (3d Cir. 1996).

134. See *Chandler v. James*, 180 F.3d 1254, 1262 (11th Cir. 1999); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

135. See *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

136. See *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990) (holding that public schools must provide equal access to student Christian club as to other student groups).

Not even suggested. Simply, permitted. If students, or other private parties, wish to speak religiously while in school or at school-related events, they may exercise their First Amendment rights to do so.¹³⁷

When speech is truly private speech, it cannot be censored by the school. The question then becomes whether speech given at a graduation ceremony over a loud speaker can truly be called private speech. The line between private speech and governmental speech is not always easy to discern. However, in the case of the truly student-initiated school prayer, the prayers should be considered private speech because the school board does not mandate, direct, or necessarily even know about them beforehand. A student-speaker can speak about a broad range of topics in a number of ways, and can choose a religious topic or a prayer. This should be taken as the representation of private choices by a private speaker, not government speech.¹³⁸

F. Perpetuation of Tradition of Prayer at School-Sponsored Events

In *Santa Fe*, the Court clearly showed its lack of tolerance for policies that appeared to be neutral at first glance, but were found to be thinly veiled attempts to continue a long-standing tradition of prayer at school events.¹³⁹ It becomes difficult to tell when a school may allow prayer and not be said to be continuing the tradition. One may go so far as to suppose that only schools that have not had a history of having prayers at graduation may now allow them. This bleak situation, however, is not the case. When a school does not mandate that a prayer occur, it is not continuing the tradition of graduation prayer. When student-speakers have absolute control over the content of their speeches, the tradition may or may not continue. In any event, it is the choice of the student-speakers whether or not to continue school prayer, and not the choice of the school.¹⁴⁰

137. *Chandler*, 180 F.3d at 1264.

138. Again, it may help for the school board to include disclaimers and to broadly word the policy, so that many choices are offered for the speakers. In other words, prayer should not be the de facto choice.

139. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S.Ct. 2266, 2282 (2000).

140. One concern, of course, is the application of the policy over time. A school may get into a new tradition of prayer. If year after year, student-speakers

G. Tolerance

One factor that the Court did not consider in either *Lee* or *Santa Fe* is tolerance. Of course, as the Court noted in *Santa Fe*, any prayer in school must comport with the mandates of the First Amendment.¹⁴¹ However, tolerance of others' views is also important, and one would hope that public policy would play an important role in a situation where an individual speaker chooses, without pressure or supervision by the state, to give a religious message.

Students graduating from high school should be mature enough to realize that the speech of an individual is simply that. It represents the viewpoint of one person, not the viewpoint of the school or the state. At the very least, students should listen to the speech, whether or not they disagree with the messages presented. Surviving life means tolerating views that differ from one's own. As the court in *Chandler* noted,

[r]espect for the rights of others to express their beliefs, both political and religious, is the price the Constitution exacts for our own liberty. This is a price we freely pay. It is not coerced. Only when the speech is commanded by the State does it unconstitutionally coerce the listener.¹⁴²

CONCLUSION

The Supreme Court has always been restrictive on allowing prayer in school activities. The Court thus far has not held any prayer or religious act in a school constitutional.¹⁴³ A case of truly student-initiated prayer, however, might be the case that will force the Court to evaluate the balance of the Establishment Clause and the Free Exercise Clause, and come down on the side of free exercise of religion.

choose to use their freedom in constructing their speeches to give a prayer or religious message, one has to question whether the policy is truly neutral. It may become, as in *Santa Fe*, a time when the policy is not about freedom of speech and student choice, but about prayer. In that case, the courts should not "turn a blind eye," but should recognize the policy for what it is: perpetuation of a tradition of school prayer. *See id.*

141. *See id.* at 2278.

142. *Chandler*, 180 F.3d at 1263.

143. *See Tanford, supra* note 22, at 426.

School administrators, and, indeed, the Supreme Court have tended to err on the side of caution when evaluating the issue of religion in public schools. This is due in part the susceptibility of school age children to religious indoctrination. However, the schools are required merely to remain neutral in the face of religion, not to be hostile toward religion.

Many school districts face the tough decision of whether to include an invocation or benediction in their graduation ceremonies. If a prayer is given in response to a vote by the graduating students, the prayer should be held a violation of the Establishment Clause of the First Amendment. If, however, truly student-initiated and not sponsored by the state in any way, the religious speech of an individual speaker chosen on neutral grounds must be allowed in order to protect the free exercise of religion. Only in these ways can the balance between the Free Exercise Clause and the Establishment Clause be maintained.

